U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 17 June 2004

In the Matter of:

RICK FADER,
Complainant,

CASE NO: 2004 AIR 27

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Respondent.

RECOMMENDED DECISION AND ORDER DISMISSING COMPLAINT FOR LACK OF JURISDICTION AND FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Statement of the Case

This complaint has been referred to the Office of Administrative Law Judges (OALJ), U.S. Department of Labor (DOL) by the Area Director, Occupational Safety & Health Administration, Cincinnati Area Office (OSHA), by letter dated April 23, 2004, pursuant to Procedures for the Handling of Discrimination Complaints under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 29 CFR Part 1979. It has been assigned to this tribunal as of May 20, 2004, for consideration and disposition. The Respondent Agency, the U.S. Department of Homeland Security, Transportation Security Administration (TSA), has filed a motion which was received June 2, 2004, to dismiss the complaint. Complainant's response was received June 3, 2004. The case is ripe for decision. This tribunal is required to hear and decide this case on the merits, regardless of the Assistant Secretary's determination to dismiss the complaint without completing the investigation, pursuant to §1979.104(b), if there otherwise is jurisdiction. §1979.109(a).

Background

OSHA's letter of reference to the Office of Administrative Law Judges incorporated a letter of even date to the Complainant, Rick Fader, advising him that his complaint filed against TSA had been dismissed without investigation. That letter included what purports to be Complainant's original complaint filed with OSHA, which OSHA averred did not establish that the Complainant, as an employee of TSA, a federal government agency, is or was an employee within the pertinent definition of AIR21. OSHA also averred that Complainant did not make a *prima facie* allegation, as required, within the jurisdiction of AIR21; and that the complaint was not timely filed with OSHA within ninety days after the date of discharge or other specified discrimination. OSHA's letter and the attached complaint filed by Complainant specify without

elaboration that the complaint alleged "violations of Federal Laws regarding the Privacy Act 1974, as well as prohibited personnel practices involving abuses of junior workforce, nepotism, and fraud." As a consequence, OSHA dismissed the complaint and declined to conduct an investigation because the complaint lacked "a *prima facia* (sic) allegation that falls under the jurisdiction of AIR 21." OSHA declared that the Complainant, as a TSA employee did not satisfy the definition of employee under AIR 21, and that the complaint was filed more than ninety days after the alleged adverse employment actions.

In his request for a hearing of his complaint, Complainant contended that the Secretary of Labor (Secretary) "erred in its determination that AIR 21 does not apply in this instance," and elaborated regarding the several pertinent findings by OSHA's Area Director recorded on the Secretary's behalf. Specifically, he averred that, because his employment was solely based on the needs of air carriers, he qualifies under the definition of "Employee" under AIR21 which includes "an individual whose employment could be affected by an air carrier or contractor or subcontractor of an air carrier." Apparently, Complainant is a "screener." He avers that TSA is a "Company" "that performs safety-sensitive functions by contract for an air carrier" and that TSA has contracted with the American public to provide security and safety sensitive functions for air carriers. He also contends that his filing with the Office of Special Counsel was timely, though that agency denied jurisdiction over TSA at the time of filing, and that he should be credited with having filed timely notwithstanding, since as a lay person he only belated learned that DOL has jurisdiction over AIR21 complaints. Complainant seeks to invoke the authority of this tribunal to waive rules pursuant to 29 CFR §1979.114 in order to allow his complaint to proceed. Implicit in his complaint that he was "reprised" for engaging in protected activity is that his activity was protected within the jurisdictional scope of AIR21.

In its motion to dismiss the complaint Respondent contends, in essence, that, as a former TSA employee, Appellant does not qualify as an airline employee under AIR21; that his complaint "that TSA terminated him in retaliation for reporting violations of Federal law regarding the Privacy Act of 1974, abuses of junior workforce, nepotism and fraud" failed to make a *prima facie* showing that that the protected activity was a contributing factor in the unfavorable personnel action; and that the complaint filed more than ninety days after the date of discharge or other alleged discrimination was untimely under AIR21. Respondent contends that, as a federal agency which does not provide air transportation, TSA does not meet the definition of air-carrier or contractor as alleged. Respondent also contends that Complainant does not qualify as an air-carrier employee protected by AIR 21.

In his response and opposition to the motion to dismiss, styled "Appellant's Motion to Continue," Complainant contends, in substance, that "all TSA employees fall under the auspices of "air-carrier" by being both U.S. Citizens, and by being indirectly responsible for providing air transportation."[1] He reasons that 29 CFR §1979.101 defines air-carrier as "a citizen of the United States undertaking **by any means, directly or indirectly, to provide air transportation**. (Emphasis added)," and that the security screening process provided by TSA is a safety sensitive function indispensable to air travel provided on an implicitly contractual basis with the nation's citizenry. He contends further that since 29 CFR §1979.101 defines an employee as an

[1] Claimant's use of "continue" in his opposition is construed to mean continue prosecution of the case, rather than postpone proceedings.

individual whose employment could be affected by an air carrier or contractor or subcontractor of an air carrier, because the so called "OPT-OUT" stipulation within the Airline Transportation Safety Act (ATSA) available to airlines would allow them to affect the employment of all TSA employees.

Complainant contends that regardless of TSA's status as a federal agency, it provides, indirectly, for air transportation as both an air carrier and a qualifying subcontractor with the public providing security for air carriers. It would follow, Complainant contends, that Complainant qualifies as an air-carrier employee protected by AIR21. Complainant alleges that the nexus between his protected activity and his termination is disclosed by the adverse entries in a previously favorable personnel record promptly following his disclosures to Congress, and the disparate treatment by TSA of himself and another employee involved in alleged misconduct. Complainant alleges pursuant to §1979.101 that he is an individual who formerly worked for a contractor or subcontractor of an air carrier, that "[c]ontractor means a company that performs safety-sensitive functions by contract for an air carrier", and that, because "company" is not defined under the regulations, TSA qualifies as a "company" under the Act and regulations, so that his complaint falls within the scope of AIR21.

Issues

1. As an employee of TSA, does Complainant qualify as a proper complainant under AIR21?

2. Does TSA qualify as an air carrier or contractor or subcontractor which qualifies as a proper respondent under AIR 21, as alleged?

3. Assuming that all of Complainant's stated allegations are true, has Complainant alleged a *prima facie* case or other basis upon which relief based upon his complaint can be granted?

4. Does the filing of the complaint comply with the time constraints imposed by AIR 21?

Findings of Fact, Discussion, and Conclusions of Law

This tribunal takes judicial notice of the fact that the TSA is a federal government agency which initially was a component of the U.S. Department of Transportation (DOT), and became a part of the U.S. Department of Homeland Security (DHS) on or about March 1, 2003.[2] As an employee of TSA, Complainant's recourse for statutory whistleblower protection is properly to

[2] The Transportation Security Administration within DOT was established by the Aviation & Transportation Security Act (ATSA), Pub. Law 107-71, signed by the President on November 19, 2001. Evidently there are unresolved jurisdictional questions which pertain to complaints after March 1, 2003, of whistleblowers who are employees of DHS. U.S. Office of Special Counsel (OSC) has recently asked the U.S. Merit Systems Protection Board to extend jurisdiction over individual appeals brought by federal airport screener alleging retaliation for whistleblowing in an amicus brief filed on May 6, 2004, in response to several initial decisions by MSPB Administrative Judges that the MSPB lacks jurisdiction over screeners' appeals under the 2001 law that created TSA. OSC is an independent investigative and prosecutorial agency which operates as a secure channel for disclosures of whistleblower complaints and abuse of authority, and a primary mission of protecting federal employee whistleblowers. See e.g. http://www.osc.gov/documents/press/2004/pr04_08.htm.

the Office of Special Counsel (OSC) under the Whistleblower Protection Act, 5 U.S.C. §2302(b), and not AIR21.[3] Complainant's arguments, while novel, are refuted by the basic structure and pattern of the applicable whistleblower protective legislation. It is apparent that federal employees, such as Complainant was when he was employed and discharged by TSA, properly have recourse to separate legislation barring prohibited personnel practices, including reprisals for whistleblowing, by federal agencies. 5 U.S.C. §2302(b). AIR21, Subchapter III, which establishes the Whistleblower Protection Program, Sec. 42121, prescribing Protection of employees providing air safety information, refers explicitly under (a) to Discrimination against Airline Employees in providing "No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee…" for protected activity.

Despite Complainant's parsing of the pertinent statutory and regulatory language, it is not disputed that Complainant was an employee of the TSA, a federal agency, at the time of the operative events. No basis has been shown which would establish that the TSA qualifies as an air carrier, directly or indirectly, under AIR21, or that TSA's statutorily and regulatorily defined federal mission to provide aspects of air carrier safety is dependent upon a contractual relation with an air carrier. The alleged contract of TSA with the public to provide air carrier safety would not establish TSA as a contractor or subcontractor of an air carrier. There is no showing that Complainant's status as an employee of TSA, and thus as a federal employee, would have conferred upon him the status of an employee or contractual employee of an air carrier. A reasonable reading of the statutory provisions and language of AIR21 and its implanting regulations convinces this tribunal that the protections are extended to civilian employees of air carriers in the generic sense, basically meaning airlines and similar air carriers, and their contractors' and subcontractors' and employees engaged in similar employment activities. There is nothing discernable in the AIR21 statute that suggests that its protections were intended by Congress to extend to federal employees, such as a screener employed by TSA, who have a separate statutory and regulatory recourse for whistleblower protection against prohibited personnel practices under 5 U.S.C. §2302(b).

AIR21 protects employees providing information related to any alleged, objectively reasonable perceived violation of federal laws or standards touching on or "relating to air carrier safety," regardless of whether the allegation is ultimately substantiated. *See Taylor v. Express One Int'l, Inc.,* 2001-AIR-2, 26 (Feb. 15, 2002). Protected activity under AIR21 has three components: (1) a report or action involving a purported violation of a federal law or FAA regulation, standard, or order relating to air carrier safety, and at least touching on air carrier safety; (2) the complainant's objectively reasonable belief about the occurrence of the purported violation; and (3) the complainant communication of his safety concern either to his employer or to the Federal Government. 49 U.S.C. §4212(a)(1). It is settled that whistleblower laws are to be given a broad interpretation consistent with their purpose. *See Weil v. Planet Airways, Inc*., 2003 AIR 18 (ALJ Mar. 16, 2004). However, a complaint may be dismissed for failure to state a claim upon which relief can be granted when it is patently obvious that the complainant could not prevail on the facts as alleged in the complaint, and a court has inherent power to dismiss such a complaint. *See Powers v. Paper, Allied-Industrial, Chemical & Energy Workers Int'l Union (PACE)*, 2004 AIR 19 (ALJ May 7, 2004). The manifestations of the complaint in the record

[3] See http://www.osc.gov/ppp.htm.

before this tribunal do not establish that a violation of federal law or regulation relating to air carrier safety was involved in the allegedly protected activity.

The complaint may be oral or in writing, but protected complaints must be specific in relation to a given practice, condition, directive, or event, which the complainant must reasonably, and objectively rather than merely subjectively, believe to be a violation related to air carrier safety. *See Peck v. Safe Air Int'l, Inc.*, ARB 02-028, ALJ 2001 AIR 3 (ARB Jan. 30, 2004); *Parshley v. America West Airlines*, 2002 AIR 10, 50 (ALJ Aug. 4, 2002), *citing Minard v. Merco Delamar Co*., 92 SWD-1 (Sec'y Jan. 25, 1995), slip op. at 8; *Keskerson v. V-12 Nuclear Weapons Plant*, 95 CAA 12 (ARB Apr. 8, 1997). The alleged act must implicate safety definitively and specifically. *See Parshley, supra* at 50, *citing American Nuclear Resources v. U.S. Dept. of Labor*, 143 F.3d 1292 (6th Cir. 1998), *citing Bechtel Construction Co. v. Secretary of Labor*, 50 F. 3d 926 (11th Cir. 1995). In the instant case, despite the passage of time and alleged submission of his complaint to two agencies, Complainant has not defined his complaint regarding his termination for activity allegedly protected under the statute. He has only alleged minimally and generally, without elaboration, specificity, or supporting documentation of any kind, that he reported violations of Federal law regarding the Privacy Act of 1974, abuses of junior workforce, nepotism, and fraud. The alleged violations, and thus the allegation, do not relate to air carrier safety facially, by necessary implication, or by implication compelled by supporting documentation or other secondary evidence. Consequently, Complainant has failed to establish an essential element of the requisite *prima facie* case.

Had Complainant raised a qualifying statutory claim in timely fashion, his lodging the claim initially with a wrong agency might have been sufficient to toll the ninety day time limit for filing his discrimination complaint under AIR21. *See Taylor, supra at 36*). Claimants who file complaints without the assistance of counsel are afforded broad latitude in framing the contents of their complaints. *See Id.; Immanuel v. Wyoming Concrete Industries, Inc.*, 1995 WPC 3 (ARB May 28, 1997). It appears that he did not file his complaint with the wrong agency in this instance, since any relief available to him would have been available from OSC. However, this issue need not be reached or resolved in this case, because the complaint fails on other grounds.

Because Complainant has not stated a claim upon which relief can be granted, and this tribunal does not have jurisdiction to resolve it under AIR21 if the claim were itself sufficient, the complaint is properly dismissed for failure to state a claim upon which relief can be granted and for lack of jurisdiction under AIR21. Complainant as a federal or former federal employee does not qualify under AIR21 to file a complaint; the TSA is not an agency properly subject to such a complaint under AIR21; and the Complainant's allegations do not establish a *prima facie* case entitling him to relief under AIR21.

RECOMMENDED ORDER

The complaint is dismissed for failure to state a claim upon which relief can be granted and for lack of jurisdiction over the subject matter of the claim.

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Edward Terhune Miller
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110, unless a petition for review is timely filed with the Administrative Review Board ("Board"), US Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b), as found OSHA, Procedures for the Handling of Discrimination Complaints Under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century; Final Rule, 68 Fed. Reg. 14099 (Mar. 21, 2003).